90-1014

~~No. 90-1446~~

In the

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, et al.,

Petitioners,

v.

DANIEL WEISMAN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE SPECIALTY RESEARCH ASSOCIATES, INC. FREE CONGRESS RESEARCH & EDUCATION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI

Specialty Research Associates, Inc., a research group based in Aledo, Texas, researches in two primary spheres: (1) historical incidents/policies pertinent to issues today; (2) statistical effects of varying educational policies on students/schools today. Amicus files this brief believing that the Court's consideration of the issue of invocations/benedictions in public schools should be accompanied by (1) an understanding of actions taken by the First Congress concurrently with the formation of the First Amendment and (2) an understanding drawn from Founders' writings of the impact that this Court's decision may have on America's youth.

Free Congress Research & Education Foundation, a non-profit foundation, seeks to advance fundamental principles of judicial restraint and the rule of law. Among these is consistent application of traditional rules of constitutional interpretation. The proper role for courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy

develop as it should, free from far-reaching decisions by courts more affected by politics than law. Amicus believes this case presents an opportunity to insist on traditional canons of interpretation.

SUMMARY OF THE ARGUMENT

In this case, the district court invalidated the long-standing practice at Nathan Bishop Middle School of allowing clergy to offer an invocation and benediction at the annual graduation ceremony on the narrow ground that the prayer used at the 1989 graduation ceremony invoked a deity.[1] It thus failed the second prong of the three-part test in *Lemon v. Kurtzman*,[2] which requires that the primary effect of a challenged practice neither advance nor inhibit religion.[3] The court of appeals saw no reason to elaborate further.[4]

This result stands in stark contrast to the original understanding of the non-establishment clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion." By that provision, the Founders sought to encourage an open and active non-coercive role for religion in public life.

Any interpretive approach or analytical framework that avoids determining the Founders' original understanding of the First Amendment cannot remain true to the Constitution. Any conclusion that demands rigid separation of religion from public life or exclusion of voluntary religious practices from education cannot remain true to history. Amici believe that the *Lemon* test is true to neither. This Court should reject it in favor of faithfully applying the original understanding of the non-establishment clause in cases such as this.

ARGUMENT

I. HISTORICAL ANALYSIS IS CENTRAL TO PROPER RESOLUTION OF THIS CASE

This Court has said that any interpretation of the non-establishment clause must "comport [] with what history reveals was the contemporaneous understanding of its guarantees."[5] Justice William Brennan wrote that "the line we must draw...is one

1. *Weisman v. Lee*, 728 F.Supp. 68, 69 (D.R.I. 1990)
2. 403 U.S. 603 (1971)
3. *Weisman*, 728 F.Supp. at 71.
4. *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990)
5. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)

which accords with history and faithfully reflects the understanding of the Founding Fathers."[6] This Court's non-establishment clause cases "have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'"[7] The Court has sought to determine the "meaning and scope" of the non-establishment clause "in the light of its history and the evils it was intended forever to suppress."[8] Two decades ago, this Court held that "[t]he more longstanding and widely accepted a practice, the greater its impact upon constitutional analysis."[9] Indeed, this Court has sought to determine the meaning of the non-establishment clause by reference to the understanding of those who framed and ratified it.[10] Amici agree with Chief Justice Rehnquist that "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."[11]

In his opinion below, Judge Bownes suggested that no reliable information exists about the ideas informing the framing and ratifying of the Constitution, the original understanding of the non-establishment clause, or the relationship between traditional religious practices and that original meaning.[12] Amici respectfully submit, and the jurisprudence of this Court affirms, that this is simply not the case. Indisputable facts exist that help determine the Founders' understanding of the non-establishment clause. These include, but are not limited to, the specific facts or colonial conditions existing in the late 1780s. It is, after all, the Founders' ***meaning***, not simply their subjective intention or factual knowledge, that this Court must apply in the present case. Thomas Jefferson stated well this fundamental interpretive principle:

> On every question of construction, [we must] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what

6. *School Dist. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).
7. *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n. 33 (1973), quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).
8. *Everson v. Board of Education*, 323 U.S. 1, 14-15 (1947).
9. *Walz v. Tax Commission*, 397 U.S. 664, 681 (1970).
10. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (Rehnquist, J., dissenting); *Lynch*, 465 U.S. at 673-78; *Everson*, 330 U.S. at 8-15.
11. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).
12. *Weisman*, 908 F.2d at 1092.

meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.[13]

II. THIS COURT HAS RECENTLY SUBSTITUTED AN ANTI-HISTORICAL APPROACH

Despite the overwhelming and consistent historical evidence that the Founders were motivated by religious principles, openly encouraged religion in public life, and even required religious instruction in schools, some of which is reviewed herein, this Court has recently adopted an anti-historical approach in cases involving the non-establishment clause. That approach has produced novel results. As Justice William Douglas noted: "It was, for example, not until 1962 that...prayers were held to violate the Establishment Clause."[14]

The first chapter in this departure from the traditional approach occurred less than 50 years ago when the Court injected for the first time as the central tenet of non-establishment clause jurisprudence the notion of a "'wall of separation between church and State'."[15] The only precedent cited for this notion was a case involving the free exercise clause. This phrase comes from a personal letter written decades after ratification of the First Amendment by someone who spent the years surrounding the framing and ratifying of that provision overseas. Justice Stanley Reed wisely cautioned that "[a] rule of law should not be drawn from a figure of speech."[16] Chief Justice Rehnquist has aptly called it a "misleading metaphor."[17]

The second chapter in the departure from an historical approach came with the Court's creation of a three-part test for evaluating the constitutionality of direct government aid to explicitly religious institutions. Whether appropriate within that narrow context or not, this test from *Lemon v. Kurtzman* hinders rather than helps faithful application of the original understanding of the First Amendment.

13. Samuel J. Knoefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (1964), p. 51. This contradicts Judge Bownes' astounding assertion that the Founders thought their intentions irrelevant in constitutional interpretation. *Weisman*, 908 F.2d at 1093.

14. *Walz*, 397 U.S. at 702 (Douglas, J., dissenting)

15. *Everson*, 330 U.S. at 16, quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

16. *McCollum v. Board of Educ.*, 333 U.S. 203, 246 (Reed, J., dissenting).

17. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

A. The *Lemon* Test Cannot Be Applied Faithfully and Consistently to Cases Involving Religious Practices in Public Life

Lemon involved direct government aid to overtly religious institutions, clearly the most constitutionally sensitive context. Outside that context, walls of separation and rigid multi-pronged tests are unnecessary to faithfully determine and apply the original understanding of the First Amendment. When the federal courts can, applying traditional canons of interpretation, take advantage of external historical sources rather than internal logical inventions, they must do so. Choosing a different course not only substitutes the Court's own preferences for the Founders' original understanding of the Constitution, but invites inconsistent application and confusion among the lower courts.

For example, using the *Lemon* test to invalidate a public school invocation requires a court to ignore the long-standing historical practice of invocations used by all three branches of government. This Court opens each day with an invocation; both houses of Congress have chaplains and open their sessions with prayer; President George Bush's 1989 inauguration ceremony began with prayer and he recently continued a tradition by declaring a National Day of Prayer. In his dissenting opinion below, Judge Campbell noted that "[t]here is a tradition of such remarks at public functions going back to the Founders."[18] At the 10th Annual Presidential Prayer Breakfast, President John F. Kennedy said that prayer is "much a part of our American heritage."[19]

Applying the *Lemon* test outside its originally narrow context has created confusion in this Court's jurisprudence as well. It produces multiple opinions in individual cases,[20] as well as supposed constitutional rules of dubious logic.[21] This Byzantine jurispru-

18. *Weisman*, 908 F.2d at 1098 (Campbell, J., dissenting).

19. *Public Papers of the President of the United States Containing the Public Messages, Speeches and Statement of the President, January 1 to December 31, 1960* (1963), pp. 175-76.

20. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989). In this case, the Court held that displaying a Nativity scene violated the non-establishment clause while displaying a menorah was permissible. Only two members of the Court could agree with both conclusions.

21. See, e.g., *Lynch*, 465 U.S. 668 (1984), in which the Court upheld a Nativity display because Santa Claus was present.

dential structure results not from faithful application of the original understanding of the First Amendment but of an artificial "test" created by this Court that has even potentially proper use only in a very narrow and specific context.

B. The *Lemon* Test Invites Hostility to Religion and Prevents the Courts from Faithfully Applying the Original Understanding of the First Amendment

The historical analysis herein invites at least one overwhelming conclusion. The Founders sought a positive and encouraging role for religion in public life while preserving freedom for individual belief and practice. Yet the *Lemon* test reflects actual hostility toward religion and demands a secularism that the Founders would consider repugnant to both religious liberty and good government.

This Court held in *Lemon* that "the [challenged] statute must have ***a*** secular legislative purpose."[22] One question, left aside here, is how this test applies when, as in the present case, no statute or legislative purpose exists. This Court has alternately stated this prong of the *Lemon* test to require that "there [be] no question that the statute or activity was motivated ***wholly*** by religious considerations."[23] Nevertheless, in his opinion below, Judge Bownes misinterpreted *Lemon* to require that "the ***predominant*** purpose of the practice [be] secular."[24] How can something this Court has called "a primary religious activity in itself"[25] have a predominantly secular purpose? Such logical semantic gamesmanship flies in the face of this nation's traditions and attacks the credibility and integrity of this Court.

This Court's past holdings that, despite all the historical evidence to the contrary, the First Amendment requires "neutrality between... religion and nonreligion"[26] and "between believers and nonbelievers,"[27] invites this metamorphosis in the *Lemon* test. Such "neutrality" has neither historical[28] nor logical support. Why is the absence of prayers or the complete removal of any religious reference from

22. *Lemon*, 403 U.S. at 612 (emphasis added).
23. *Lynch*, 465 U.S. at 680 (emphasis added).
24. *Weisman*, 908 F.2d at 1094 (emphasis added).
25. *Wallace*, 472 U.S. at 44 n. 22.
26. *Epperson v. Arkansas*, 393 U.S. 97 (1968).
27. *Walz*, 392 U.S. at 716.
28. See *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting): "The Establishment Clause did not require government neutrality between religion and irreligion."

them any more neutral between the secular and the sacred than the invocation in the present case? It is not. Are legislative prayers any more "neutral" than graduation prayers? This misleading notion effects a subtle shift in doctrine and application that eventually has institutionalized and perhaps constitutionalized hostility to religion.

Moreover, the hostility inherent in the *Lemon* test has resulted in every conceivable argument to cast this quintessential religious practice as a secular exercise. Why? Because the Constitution requires ignoring reality? No, because the *Lemon* test is inherently hostile to religion in a way the Constitution is not. This explains the supposed "irony" noted by Judge Bownes in his opinion below of religious groups arguing that prayer is "merely ceremonial."[29] They must make such arguments in attempting to make a constitutional practice pass precedential muster. This means that *Lemon* actually repudiates the original understanding, as summarized by this Court nearly two decades before:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[30]

The second prong of the *Lemon* test states that a practice's "principal or primary effect must be one that neither advances nor inhibits religion."[31] This Court has provided an alternative phrasing of the effect prong: "Government promotes religion...when it fosters a ***close*** identification of its powers and responsibilities with those of any--or all--religious denominations."[32] As with the first prong, courts have given this test an increasingly religion-hostile interpretation. Judge Bownes in his opinion below put this spin on it: "The purpose prong...asks whether the government's actual pur-

29. *Weisman*, 908 F.2d at 1095 n. 13.
30. *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).
31. *Lemon*, 403 U.S. at 612.
32. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 389 (emphasis added).

pose is to endorse or disapprove of religion."[33] However, divorced as this analysis is from the original understanding of the First Amendment, it has produced a conclusion that the literal presence of prayer, or even the opportunity for individuals to pray silently, constitutes improper identification.

Only two options exist for prayer - presence or absence - just as two options exist for religion - religion or non-religion. If presence or identification alone means endorsement, absence must mean disapproval. Any decision about prayer, whether to allow or prohibit it, will therefore be to endorse it or disapprove it, to advance it or inhibit it. These dual portions of the second *Lemon* prong are mutually exclusive.

The courts below invalidated the invocation in the present case under this prong.[34] The district court held that the invocation created "[a]n identification of school with a deity, and therefore religion."[35] Is this identification any less significant in a legislature, a presidential inauguration, or this Court? Since the Founders, as discussed herein, required religious instruction in American schools, it cannot be said that they would object to the mere "identification" of school with religion. This second prong of *Lemon* is divorced from the lessons of history and from the original understanding of the First Amendment. It is inherently anti-religion. This Court should instead adhere to its holding last year that "the schools do not endorse everything they fail to censor."[36]

The third *Lemon* prong states that "the statute must not foster an excessive government entanglement with religion.'"[37] On its face, given the Founders' view of religion and the original understanding of the First Amendment, government involvement and even encouragement or facilitation of religion is not impermissible. Because the *Lemon* test is divorced from that understanding and permits courts to fashion their own rules for implementing this religion-hostile test, courts are in a position to micro-manage religious practices. Judge Nelson dissented from an invalidation of a Nativity scene and wrote: "I question whether it is appropriate for

33. *Weisman*, 908 F.2d at 1094.

34. *Weisman*, 728 F.Supp. at 71.

35. *Id.*

36. *Board of Educ. of the Westside Community Schools v. Mergens*, 110 L.Ed.2d 191, 216 (1990).

37. *Lemon*, 403 U.S. at 613, quoting *Walz*, 392 U.S. at 674.

the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations."[38] This micro-management, requiring as it does screening of curricula, programs, and practices, has given the courts "the role of a super board of education for every school district in the nation."[39] It is this role that has caused an ongoing, excessive, and intrusive government entanglement with religion.

This Court has said that it is not to be involved in parsing the content of religious activities,[40] but the courts have been in just that position, drawing distinctions of constitutional significance based on individual words or phrases.[41] The only way to determine the "secular effect" of a prayer is to examine its contents. School officials sometimes actually use pamphlets detailing steps for secularizing prayers.[42] It is the dictates of *Lemon* , not the original meaning of the First Amendment, that produces such micro-managing entanglement. Yet it is the First Amendment, rather than misapplied and historically flawed precedent, that should govern in this area.

As in cases such as *Marsh*, this Court has bypassed the *Lemon* test altogether in order to uphold practices such as legislative prayers. Justice Brennan wrote in *Marsh* that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."[43] The fault lies with *Lemon* and its rejection of the original understanding of the First Amendment and its inherent hostility to religion, not with the First Amendment itself.

38. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

39. *McCollum*, 203 U.S. at 237 (Jackson, J. concurring).

40. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983).

41. "A Sixth Circuit panel struck down a school invocation and benediction... [because] the content of the prayer in question violated the Establishment Clause because it was not sufficiently non-denominational." *Weisman*, 908 F.2d at 1096; the *Stein* court explained the problem with the prayer: "The invocations and benedictions delivered...employ...the language of Christian theology and prayer. Some expressly invoke the name of Jesus as the Savior." *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987).

42. "Appellants make much of the fact that the school has chosen to give a suitably non-denominational prayer because school officials distributed a pamphlet entitled 'Guidelines for Civic Occasions.' These guidelines suggest what kind of prayer should be written." *Weisman*, 908 F.2d at 1095.

43. *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting).

III. THIS COURT SHOULD RETURN TO APPLYING THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT IN THESE CASES

A. Abandoning the *Lemon* Test Would Allow Consistent Application of the Original Understanding

A majority of this Court has expressed dissatisfaction with the manifestly anti-historical and artificial approach of *Lemon*. Justice White has said that faithful application of the proper historical approach would make "quite understandable" a reassessment of this Court's precedents that conflict with that approach.[44] Justice Kennedy has said that "[s]ubstantial revision of our Establishment Clause doctrine may be in order."[45] Chief Justice Rehnquist has said that the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."[46] Justice O'Connor has expressed "doubts about the entanglement test" of *Lemon*[47] while Justice Scalia has said that a "pessimistic evaluation...of the totality of *Lemon* is particularly applicable to the 'purpose' prong."[48]

Justice Brennan wrote that jurisprudence in the non-establishment context must accord with history and faithfully reflect the understanding of the Founders.[49] Thus an approach which makes such faithful reflection impossible must be reassessed. The *Lemon* formulation, based as it is on a contemporary view insisting on a separation not of church and state but of religion and public life, cannot meet this test. The *Lemon* test prevents this Court from applying the original understanding.

Since that must be the lynchpin of the court's jurisprudence in this context, amici urge this Court, if it chooses to retain the *Lemon* test, to restrict its application to the context which generated it--direct government aid to explicitly religious institutions. Amici urge the Court to return to application of the original understanding

44. *Wallace*, 472 U.S. at 91. See also *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment): "I am no more reconciled now to *Lemon I* than I was when it was decided."

45. *County of Allegheny*, 109 S.Ct. at 3134.

46. *Wallace*, 472 U.S. at 112.

47. *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting).

48. *Edwards v. Aguillard*, 482 U.S. 578, 636 (Scalia, J., dissenting).

49. *School Dist. v. Schempp*, 374 U.S. at 294 (1963) (Brennan, J., concurring).

of the First Amendment in other cases implicating the non-establishment clause.

The Founders sought both to encourage religion generally and to preserve religious liberty. Their guiding principle in striking this balance was non-coercion. For example, James Madison's public proclamations while President reveal a strong endorsement and encouragement of religious principles accompanied by similarly strong declarations of non-compulsion and non-coercion.[50] The state constitutions authored by the Founders during and subsequent to the federal document have the same emphasis: an open declaration of the duty of every citizen to acknowledge God immediately followed by a non-coercion clause.

B. Abandoning the *Lemon* Test in Favor of the Original Understanding Would Once Again Allow Practices and Activities the Founders Sought to Encourage and Which Can Benefit Society

By adopting the religion-hostile *Lemon* test, the federal courts have removed from our society activities the Founders wholeheartedly endorsed and encouraged. The Founders predicted the consequences of expunging God from the national consciousness. George Washington warned of a loss of "security for life, liberty, property without a sense of religious obligations."[51] John Adams said that there was no "power capable of contending with human passions unbridled by morality and religion"[52] Daniel Webster maintained that "the cultivation of the religious sentiment represses licentiousness...inspires respect for law and order"[53] Thomas Jefferson believed that our very liberties cannot be secure if "we have removed their only firm basis, a conviction in the minds of the people that these liberties are...the gift of God."[54]

50. *Messages and Papers of the Presidents* (1899), Vol. 1, pp. 513, 532, 558, 561.

51. *Id.*, Vol. 1, p. 220.

52. J. Adams, *The Works of John Adams, Second President of the United States*, collected by Charles Francis Adams (1854).

53. D. Webster, *The Works of Daniel Webster* (1853), Vol. II, p. 615, from Daniel Webster's address at the dedication of the addition to the Capitol building while he was Secretary of State.

54. T. Jefferson, *Notes on the State of Virginia, Query XVIII*.

The Founders' predictions have been realized. Radio newsbroadcasts on April 29, 1991, reported that 65 percent of violent crime is committed by minors. In his opinion below, Judge Campbell wrote:

> If one were to ask people what are the problems of our time, they would hardly respond that our youth and their parents are being corrupted by over-exposure to noble aspirations [represented by graduation invocations]. The common complaints are that 13 year-old children are selling crack; that instead of doing homework, students are watching violent TV; that the tolerant ideals mentioned by the rabbi are being rejected in favor of destructive habits of mind and character. So what good, one might ask, is accomplished by preventing an invocation like this?[55]

Congressman Tony Hall stated recently: "More than 130,000 teachers are assaulted by their students each year. In the last 15 years, the rate of teen suicides has gone up by 50. By the end of high school 61 percent of our students will have used drugs."[56] The first four months of the current academic year witnessed more than 4,300 arrests in the Chicago public schools for offenses ranging from disorderly conduct to battery and weapons violations.[57] A recent study showed that the abortion rate for girls under 15 years of age rose 18 percent during the 1980s, mainly because of increased teenage sexual activity.[58]

IV. THE FOUNDERS EXPLICITLY CONTEMPLATED A ROLE FOR RELIGION IN EDUCATION

Rejecting the artificial *Lemon* test and returning to the original understanding of the First Amendment reveals a body of evidence affording a clear basis for reversing the court below.

A. Prominent Founders Clearly Expressed Their Understanding of the Role of Religion in Education

This Court has looked to James Madison and Thomas Jefferson when determining the original understanding of the First Amend-

55. *Weisman*, 908 F.2d at 1098.

56. 135 *Congressional Record* (January 31, 1989).

57. "School Arrests Net 4,306 In Four Months," *Chicago Sun-Times*, January 16, 1991, pp. 1, 4.

58. "Abortion Rate Rose in '80s for Girls Under 15," *Washington Post*, April 25, 1991, p. A10.

ment. Early historical works, however, identify at least 243 "Founding Fathers" influential in the development of constitutional government.[59] Many of these made equal or greater contributions to the First Amendment.[60] Fifty-five individuals worked directly to produce the Constitution and 90 members of the First Congress formulated the Amendments. Most were prolific writers who left a significant heritage of their writings.[61] They are equally or more important as authorities on the original understanding of the First Amendment than Jefferson, who was in France at the time and did not directly participate in the Constitutional Convention, the Congress which formulated the Bill of Rights, or the process of ratifying those instruments.

James Wilson was the second most active member of the Constitutional Convention, speaking 168 times. He signed both the Declaration of Independence and the Constitution and President George Washington appointed him to the Supreme Court in 1789. As the first professor of law at the College of Philadelphia, Wilson's lectures "enunciated the arguments Chief Justice John Marshall later used" and "remain landmarks in the history of American jurisprudence."[62] The Supreme Court of Pennsylvania cited Wilson's *Course of Lectures* as insight on the original understanding of the First Amendment:

> The late Judge Wilson, of the Supreme Court of the United States...had just risen from his seat in the convention which formed the constitution of the United States, and of this state; and it is well known, that for our present form of government

59. See E. S. Brooks, *Historic Americans* (1899); B. J. Lossing, *Eminent Americans* (1881); L. C. Judson, *The Heroes and Sages of the American Revolution* (1852); *Lives of the Heroes of the American Revolution* (1848).

60. "Deifying Madison does him an injustice...we have to admire...his staggering honesty in reporting the discussion at the convention...of the seventy-one proposals that Madison introduced or argued for during the convention, forty were defeated." D. S. Lutz, *The Origins of American Constitutionalism* (1988), p. 136. Further, the anti-federalists like George Mason and Patrick Henry, not federalists like James Madison, were the driving force behind the First Amendment and the Bill of Rights.

61. The "Shaw Collection" and the "Evans Collection," compiled through cooperation of the American Antiquarian Society, Yale Library, Harvard Library, and Princeton Library, include copies of every work published in America from 1639 to 1812, nearly 100,000 volumes.

62. *Webster's American Biographies* (1974), p. 1144.

we are greatly indebted to his exertions and influence. With his fresh recollections of both constitutions, in his *Course of Lectures*, he states that...Christianity is part of the common-law.[63]

Gouverneur Morris was the most prolific member of the Constitutional Convention, speaking 173 times on the floor. As head of the Committee on Style, he was responsible for the words over which we so often wrangle. In his *Observations on Government*, Morris offered to the French suggestions on establishing a successful government: "Religion is the only solid basis of good morals; therefore education should teach the precepts of religion, and the duties of man toward God."[64]

Fisher Ames was also a member of the Constitutional Convention and the First Congress. He proposed the wording for the First Amendment finally adopted by the House on August 20, 1789: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[65] Ames also wrote about American education:

Most young hearts are tender...Why then...should not the Bible regain the place it once held as a school book? Its morals are pure, its examples captivating and noble. The reverence for the Sacred Book that is thus early impressed, lasts long; and, probably, if not impressed in infancy, never takes firm hold of the mind.[66]

Benjamin Rush signed the Declaration of Independence, led the ratification fight in Pennsylvania, helped form that state's 1790 constitution, and served as U.S. Treasurer. His views on religion in education were widely circulated even years after his death.[67] He reviewed pro and con arguments on using the Bible as a school book. Significantly, none of these arguments was based on a constitutional or "separation" issue. He concluded with this observation:

In contemplating the political institutions of the United States, I lament that we waste so much time and money in punishing crimes and take so little pains to prevent them...we neglect the

63. *Updegraph v. Commonwealth*, 11 Serg. & R. 403 (1824)

64. H.B. Adams, *Life and Writings of Jared Sparks* (1893), Vol. 2, pp. 487-489, 491.

65. *Annals of Congress* (1834), Vol. I, p. 766.

66. T. B. Wait, *Life of Fisher Ames* (1809), pp. 134-135.

67. *American Tract Society, Vol. VIII* (1823), p. 89ff.

only means of establishing and perpetuating our republican forms of government; that is, the universal education of our youth in the principles of Christianity by means of the Bible.[68]

George Washington, in his Farewell Address of September 19, 1796, spoke as the nation's chief executive:

Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert... And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[69]

Samuel Adams was a delegate to the Massachusetts ratifying convention and served that state as Lieutenant Governor and Governor. In a letter to John Adams, he wrote:

Let divines and philosophers, statesmen and patriots, unite their endeavors to renovate the age by impressing the minds of men with the importance of educating their little boys and girls, of inculcating in the minds of youth the fear and love of the Deity...and, in subordination to these great principles, the love of their country...in short, of leading them in the study and practice of the exalted virtues of the Christian system.[70]

John Adams wrote back: "You and I agree."[71]

Jefferson's own actions concerning religion in education affirm the consistent pattern set by the Founders. He founded the University of Virginia, a school wholly governed, managed, and controlled by the state. He set forth his views in his annual report as Rector dated October 7, 1822, and approved by the Visitors of the University including James Madison. University regulations later provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will

68. *Id.* at 99.

69. *Supra* note 50 at Vol. 1, p. 220.

70. *Four Letters Between John Adams Late President of the United States and Samuel Adams Late Governor of Massachusetts* (1802).

71. *Id.*

be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the university at its stated hour.[72]

This statement, of course, followed Jefferson's oft-quoted letter mentioning a "wall of separation between church and State." Justice Stanley Reed concluded that the wall

> that Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of this conclusion on education are considerable. A rule of law should not be drawn from a figure of speech.[73]

Jefferson authored the first plan of public education for Washington, D.C. schools[74] and installed Watt's Hymnal and the Bible as the primary reading texts for students.[75] He explained that "[t]he Bible is the cornerstone of liberty...a student's perusal of that Sacred volume will make them better citizens."[76]

B. The Congress That Passed the First Amendment Required Religious Instruction in School

Congress passed both the First Amendment and the "Bill to Provide for the Government of the Territory Northwest of the River Ohio" (the "Northwest Ordinance") at the same time.[77] That bill contained the requirements for statehood and stated: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[78]

72. As quoted in *McCollum*, 333 U.S. at 246 (1948) (Reed, J., dissenting).
73. *Id.* at 247.
74. J.O. Wilson, *Public Schools of Washington* (1897), Vol. 1, p. 5.
75. *Id.* at 9.
76. S. McDowell & M. Beliles, *America's Providential History* (1988), p. 148.
77. Debate over the First Amendment lasted from June 7 to September 25, 1789. The same year, the House approved the Northwest Ordinance on July 21, the Senate followed suit on August 4, and President George Washington signed it on August 7. *Supra* note 65 at Vol. I, p. 56, 660. The ordinance was originally adopted under the Articles of Confederation on July 13, 1787, but the Founders considered it so important that they re-passed it under the new Constitution.
78. I. W. Andrew, *Manual of the Constitution of the United States* (1874), Appendix XIII.

As this Court has stated, "prayer is the quintessential religious practice."[79] The fact that the Founders considered religion an essential part of education makes inconceivable the notion that they would have objected to invocations or benedictions. Indeed, it defies both logic and history to suggest that the Congress would, on the one hand, pass legislation requiring religious instruction and, on the other hand, enact a constitutional provision to invalidate that very legislation. As this Court held in *Marsh v. Chambers:*

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain [to deliver opening prayers] for each House and also voted to approve the draft of the First Amendment for submission to the states, [that] they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.[80]

The Northwest Ordinance is listed in the annotated version of the *United States Code* along with the Constitution, Declaration of Independence, and Articles of Confederation as one of the "organic laws of the United States of America." Congress made adherence to the Northwest Ordinance a condition of statehood[81] and the newly admitted states used verbatim portions of the Ordinance, specifically its third article, in their constitutions.

On April 30, 1802, Congress passed the enabling act for Ohio.[82] Consequently, the Ohio constitution of November 1, 1802, states:

> Religion, morality, and knowledge, being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision.[83]

On March 1, 1817, Congress passed the enabling act for Mississippi. The 1817 Mississippi constitution states:

> Religion, morality, and knowledge, being necessary to good government, the preservation of liberty and the happiness of

79. *Wallace*, 472 U.S. at 44 n. 22.
80. *Marsh*, 463 U.S. at 790 (1983).
81. See, e.g., the enabling acts for Alabama (Mar. 2, 1819, c. 47, 3 Stat. 489), Illinois (Dec. 3, 1818, 3 Stat. 536), Indiana (Apr. 13, 1816, c. 56, 3 Stat. 289).
82. Apr. 30, 1802, c. 40, 2 Stat. 173 at 174.
83. *The Constitutions of all the United States According to the Latest Amendments* (1817), p. 343.

mankind, schools and the means of education shall be forever encouraged in this state.[84]

The same Congress that prohibited federal laws "respecting the establishment of religion" also required that religion be included in schools. The Founders could not have viewed the latter as violating the former. The same conclusion applies after the ratification of the Fourteenth Amendment. The Nebraska constitution of June 12, 1875, required that:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws...to encourage schools and the means of instruction.[85]

V. RELIGIOUS PRACTICES AND TEACHING IN EDUCATION FORM A FUNDAMENTAL PART OF THIS NATION'S HISTORY AND TRADITION

A. Religious Principles Have Long Been Part of American Education

In his opinion below, Judge Bownes believed that historical analysis is irrelevant because "'free public schools were virtually non-existent at the time the Constitution was adopted.'"[86] He seems to assert that the original understanding of the First Amendment is only important if a case factually parallels conditions or situations within the Founders' specific knowledge or experience. The source of this bizarre interpretive principle remains a mystery and it certainly has not characterized this Court's approach to constitutional questions in the past. Under it, analyzing the Fourth Amendment's application to wire taps, the First Amendment's application to record albums, or the Sixth Amendment's application to videotaped trial testimony would be impossible. Rather, this Court must inquire into the ***meaning*** of the non-establishment clause as understood by the Founders.

Beyond this general point, the factual question of the existence of free public schools in 1789 matters little since the Founders

84. *Id.* at 389.

85. M.B.C. True, *A Manual of the History and Civil Government of The State of Nebraska* (1885), p. 34.

86. *Weisman*, 908 F.2d at 1096, quoting *Edwards*, 482 U.S. at 583 n. 4 (1987).

mandated in the Northwest Ordinance that ***any*** system of education teach religion. This included schools managed and controlled by the state, whether or not they were called "free public schools."

The great statesman Daniel Webster successfully argued before this Court that the intended plan of education for a proposed school was "anti-Christian, and therefore repugnant to the law"[87] and that no school can teach morality without religion.[88]

A report by the Senate Judiciary Committee in 1853 confirmed the role of religious principles in American education: "We are a Christian people...not because the law demands it, not to gain exclusive benefits or to avoid legal disabilities, but from choice and **education.**"[89]

B. The Role of Religious Principles in Education Remained Unaffected by the Fourteenth Amendment

The religious educational policies initiated by the Founders continued past ratification of the Fourteenth Amendment. In 1889, the Commissioner of the United States Bureau of Education,[90] responsible for the nation's public schools, released a report. In a school offered as a model, the total number of hours devoted to religious instruction surpassed the number of instructional hours dedicated to writing, physics, natural history, or geography, and was equal to the number of hours of instruction in history.[91]

In 1890, public school officials in Kansas prepared a historical legacy of education in the state and nation and presented it at the 400th anniversary celebration of Columbus Day. It showed that while education in America had been "nurtured in the lap of the church,"[92] soon these schools "became so necessary to society at large that the church reluctantly relinquished her claim upon the

87. *Vidal v. Girard's Executors*, 43 U.S. 126, 143 (1844)

88. *Id.* at 153. Also *supra* note 53 at Vol. VI, p. 153-154. This is the only version of Daniel Webster's works prepared under his personal supervision.

89. B. F. Morris, *The Christian Life and Character of the Civil Institutions of the United States* (1864), p. 326 (emphasis added).

90. The United States Bureau of Education was created as a Department on March 2, 1867, and made an Office of the Interior Department on July 1, 1869.

91. *Report of the Commissioner of Education for the Year 1887-88* (1889), p. 886.

92. *Columbian History of Education in Kansas: An Account of the Public School System, An Explanation of its Practical Operations, Compiled by Kansas Educators* (1893), p. 81.

elementary schools, and turned them over to the care of the commonwealths."[93] The superintendent of education then commented on this decision:

> Whether this was wise or not is not [our] purpose to discuss, further than to remark that, if the study of the Bible is to be excluded from all **State schools,** if the inculcation of the principles of Christianity is to have no place in the daily programme, if the worship of God is to form no part of the general exercises of these **public elementary schools,** then the good of the State would be better served by restoring all schools to church control.[94]

State laws governing public education in 1925 show continuing acceptance of this view:

> *Florida*. Whereas, it is in the interest of good moral training, of a life of honorable thought and good citizenship, that the public school children should have lessons of morality brought to their attention during their school days, therefore be it enacted by the State of Florida...That all schools in this state that are supported in whole or in part by public funds, be, and the same are, hereby required to have once every school day readings in the presence of the pupils from the Holy Bible, without sectarian [denominational] comment.[95]
>
> *Delaware:* Section 2. In each public school classroom of the state, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening...by the teacher in charge thereof.[96]

VI. THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT GENERALLY ENDORSED AND ENCOURAGED RELIGION IN PUBLIC LIFE

The backdrop for the Founders' views on religion in education is their general endorsement and encouragement of religion in public life.

93. *Id.* at 81-82.

94. *Id.* at 82 (emphasis added).

95. *Private Schools and State Laws...Governing Bible Reading in the Public Schools*, compiled by Charles N. Lischka (1926), *Education Bulletins, No. 2, January, 1926*, p. 275.

96. *Id.*

This Court has already noted "an unbroken history of official acknowledgement by all three branches of [the] government of the role of religion.[97] The Founders who became Presidents used their position within the federal government to endorse and encourage religion and public prayer.[98] President George Washington stated:

> "No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than the people of the United States."[99] (April 30, 1789); "It is the duty...to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor."[100] (October 3, 1789); "It is...our duty... to acknowledge our many and great obligations to Almighty God and to implore Him to continue and confirm the blessings we experience."[101] (January 1, 1795)

Similarly, President John Adams declared:

> "The safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is...an indispensable duty which the people owe to Him."[102] (March 23, 1798); "As no truth is more clearly taught in the Volume of Inspiration, nor any more fully demonstrated by the experience of all ages, than that a deep sense and a due acknowledgment of the governing providence of a Supreme Being...are conducive

97. *Lynch*, 465 U.S. at 674. See also *McGowan v. Maryland*, 366 U.S. 420, 431-34 (1961).

98. In his opinion below, Judge Bownes stated: "I point our there is formidable religious authority condemning prayer in public: 'And when thou prayest...enter into thy closet, and when thou hast shut the door, pray to thy Father in secret.' Matthew 6:5-7" *Weisman*, 908 F.2d at 1090 n. 1. This is the essence of poor scholarship. Jesus prayed in public three times more often than in private (see, e.g., Matthew 14:19, 15:36, 19:13; Mark 6:41, 8:6-7, 10:16; Luke 3:21, 9:16, 24:50-51; John 6:11, 6:23) and his rebuke in Matthew 6 was against hypocritical prayer designed to attract personal attention from others, not against public prayer. Furthermore, the Founders cited the Bible when discussing the propriety of public prayer. See Roger Sherman, *Supra* note 65 for Sept. 25, 1789.

99. *Supra* note 50 at Vol. 1, p. 52.

100. *Id.* at 64.

101. *Id.* at 180.

102. *Id.* at 268.

equally to the happiness...of individuals and to the well-being of communities."[103] (March 6, 1799)

President Adams explained further this need to encourage religion in an address to the military in October 1798. He said that "[w]e have no government armed with power capable of contending with human passions unbridled by morality and religion...Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other. "[104]

President James Madison said: "No people ought to feel greater obligations to celebrate the goodness of the Great Disposer of events, and of the destiny of nations, than the people of the United States."[105] (March 4, 1815)

In his "Notes on the State of Virginia," Jefferson asked:

> Can the liberties of a nation be thought secure when we have removed their only firm basis, ***a conviction in the minds*** of the people that these liberties are...the gift of God?[106]

John Jay, the first Chief Justice of this Court, stated: "The most effectual means of securing the continuance of our civil and religious liberties, is always to remember with reverence and gratitude the source from which they flow."[107]

John Hancock, in his 1780 Inaugural Address as the first Governor of Massachusetts, declared:

> Sensible of the importance of Christian piety and virtue to the order and happiness of a state, I cannot but earnestly commend to you every measure for their support and encouragement... and if anything can be further done on the same basis for the relief of the public teachers of religion and morality...I shall most readily concur with you in every such measure.[108]

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103. *Id.* at 284-85.

104. *Supra* note 52.

105. *Supra* note 50 at Vol. 1, p. 561. Madison made similar statements on July 9, 1812, July 23, 1813, and November 16, 1814; see *id.* at 513, 532, 558.

106. *Supra* note 54 (emphasis added).

107. J. Jay, *The Correspondence and Public Papers of John Jay, 1794–1826* (1970), Vol . IV, p. 477.

108. A. E. Brown, *John Hancock* (1898), p. 269.

In addition to individual Founders, states through their constitutions acknowledged God and the need for religious education. The 1792 New Hampshire constitution explained:

> As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government... the people of this state...do hereby fully empower, the Legislature, to authorize...for the support and maintenance of public...teachers of piety, religion, and morality.[109]

The common understanding here is obvious. The Founders, at the state and national levels, sought to encourage religious principles. Courts, applying traditional canons of interpretation, followed suit:

> Laws cannot be administered in any civilized government unless the people are taught to revere the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life. It is of the utmost moment, therefore, that they should be reminded of their religious duties at stated periods...A wise policy would naturally lead to the formation of laws calculated to subserve those salutary purposes.[110]

Courts have addressed attempts to separate religious principles from public institutions before:

> The assertion is once more made that Christianity never was received as part of the common law of this Christian land; and it is added, that if it was, it was virtually repealed by the constitution of the United States...Christianity, general Christianity, is and always has been a part of the common law...In this the constitution of the United States has made no alteration.[111]

> Though the constitution has discarded religious establishments...this declaration (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation from all consideration and notice of the law.[112]

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109. *Supra* note 83 at pp. 27-28.

110. *Commonwealth v. Wolf*, 3 Serg. & R. 50 (1817).

111. *Updegraph*, 11 Serg. & R. at 399.

112. *People v. Ruggles*, 8 Johns 290, 296 (1811)

> Christianity is part and parcel of the common law...Christianity has reference to the principles of right and wrong...it is the foundation of those morals and manners upon which our society is formed; it is their basis. Remove this and they would fall.[113]

This Court reaffirmed these declarations after the Fourteenth Amendment:

> The question has seldom been presented to the Courts, yet we find that in *Updegraph v. The Commonwealth*, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law...not Christianity with an established church..." And in *The People v. Ruggles*, Chancellor Kent, the great commentator on American law...said: "The morality of the country is deeply engrafted upon Christianity, and not upon the doctrines or worship of [other religions]." And in the famous case of *Vidal v. Girard's Executors*, this Court...observed: "It is also said, and truly, that the Christian religion is a part of the common law."[114]

The original understanding of the First Amendment is readily determined from the Founders' writings, records, or early judicial rulings. Those arguing for a divorce of basic religious principles and practices from public affairs based on the First Amendment found no allies in the courts or Congress.

VII. THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT WAS THAT GOVERNMENT MAY NOT OFFICIALLY PREFER ONE SECT OVER ANOTHER

In the last few decades, courts seem to have struggled with defining words in the First Amendment such as "establishment," "respecting," or "religion."[115] This confusion is of recent vintage. Examining the proposed versions of the non-establishment clause reveal much about its original understanding. On September 3, 1789, several versions were proposed: "Congress shall not make any law...establishing any religious sect or society..."; "Congress shall make no law establishing any particular denomination of

113. *City of Charleston v. S.A. Benjamin*, 2 Strob. 508, 520 (1846)
114. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892).
115. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Lemon*, 403 U.S. at 612; *Weisman*, 908 F.2d at 1092.

religion in preference to another..."; "Congress shall make no law establishing one religious society in preference to others..."[116]

Members of Congress relied on their own state constitutions as sources for such proposals.[117] Those documents, therefore, shed additional light on the original understanding behind the First Amendment:

> NEW HAMPSHIRE, 1784. Part One, Article I, Section 6. And every denomination of Christians...shall be equally under the protection of the laws: and no subordination of any one sect or denomination to another, shall ever be established by law.[118]
>
> MASSACHUSETTS, 1780. First Part, Article III. And every denomination of Christians...shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.[119]

The Word "religion" as it finally appears in the non-establishment clause was used by the Founders interchangeably with "religious sect," "religious society," and "particular denomination." Early courts recognized that official preference among denominations was what the First Amendment prohibited:

> Religion is of general and public concern, and on its support depend, in great measure, the peace and good order of government, the safety and happiness of the people. By our form of government, the Christian religion is the established religion; and all sects and denominations of Christians are placed upon the same equal footing, and are equally entitled to protection in their religious liberty.[120]

In 1852, a group, citing the non-establishment clause, petitioned Congress to separate religious practices from public affairs and to cease public prayers. The House and the Senate Judiciary Committees conducted lengthy investigations of the Founders' writings and legislative actions. On January 19, 1853, the following report

116. *Supra* note 65 at 75.
117. See E. S. Gaustad, *Faith of Our Fathers* (1987), Appendix A, p. 157.
118. *Supra* note 83 at 62.
119. *Id.* at 29.
120. *Runkel v. Winemiller*, 4 Harris & McHenry at 450 (1799).

was made in the Senate:

> The [First Amendment] clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother-country....They intended, by this amendment, to prohibit "an establishment of religion" such as the English Church presented, or any thing like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people...they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistic apathy.[121]

On March 27, 1854, the following report was made in the House:

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these....At the time of the adoption of the Constitution and the amendments, the universal sentiment was that Christianity should be encouraged, not any one [denomination]. Any attempt to level and discard all religion would have been viewed with universal indignation...There is a great and very prevalent error on this subject in the opinion that those who organized the Government did not legislate on religion.[122]

Constitutional scholars after the generation of the Founders reached similar conclusions. President James Madison appointed Joseph Story to the Supreme Court, where he served for 34 years. Justice Story, also a professor at Harvard Law School, outlined the original understanding of the First Amendment in an 1840 treatise:

> We are not to attribute this prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity which none could hold in more reverence

121. *Supra* note 89 at pp. 324, 327.
122. *Id.* at 317, 321.

> than the framers of the Constitution[123]...at the time of the adoption of the Constitution and of the Amendments to it, the general, if not universal, sentiment in America was that Christianity ought to receive encouragement from the State...An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[124]

VIII. THE FOUNDERS' MOTIVATING INFLUENCES AFFIRM THE CONCLUSIONS ABOUT THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT

In his opinion below, Judge Bownes believed that noting 18th century religious practices "is not a persuasive argument about the meaning of the Constitution because historians have noted that the various religious practices of the government in the nineteenth century were more expansive than at the time of ratification."[125] Whether correct or not, this observation is irrelevant. What amici urge upon this Court through historical evidence is that the practice at issue in the present case is substantially ***less expansive*** than anything the Founders accepted and promoted at the time the Constitution was framed and ratified.

A group of scholars embarked on an ambitious ten-year project to determine the source for the Founders' ideas by analyzing more than 15,000 political writings from the founding era (1760-1805). Some 3,154 quotations drawn from these writings were isolated and categorized. The following tables present the authorities the Founders' themselves cited:

123. J. Story, *A Familiar Exposition of The Constitution of the United States* (1840), p. 314.
124. *Id.*
125. *Weisman*, 908 F.2d at 1092 n. 1.

Origin and Distribution of Citations Given in Founders' Writings[126]

Category	1760s	1770s	1780s	1790s	1800-05	% of Total
Bible	24%	44%	34%	29%	38%	34%
Enlightenment	32%	18%	24%	21%	18%	22%
Whig	10%	20%	19%	17%	15%	18%
Common-Law	12%	4%	9%	14%	20%	11%
Classical	8%	11%	10%	11%	2%	9%
Other	14%	3%	4%	8%	7%	6%
Total	100%	100%	100%	100%	100%	100%
n= (number of citations)	216	544	1,306	674	414	3,154

Most Cited Thinkers[127]

Category	1760s	1770s	1780s	1790s	1800-05	% of Total
Montesquieu	8%	7%	14%	4%	1%	8.3%
Blackstone	1%	3%	7%	11%	15%	7.9%
Locke	11%	7%	1%	1%	1%	2.9%
Hume	1%	1%	1%	6%	5%	2.7%
Plutarch	1%	3%	1%	2%	0%	1.5%
Beccaria	0%	1%	3%	0%	0%	1.5%
Cato	1%	1%	3%	0%	0%	1.4%
De Lolme	0%	0%	3%	1%	0%	1.4%
Pufendorf	4%	0%	1%	0%	5%	1.3%
Coke	5%	0%	1%	2%	4%	1.3%
Cicero	1%	1%	1%	2%	1%	1.2%
Hobbes	0%	1%	1%	0%	0%	1.0%
Subtotal	33%	25%	37%	29%	32%	32.4%
Others	67%	75%	63%	71%	68%	67.6%
Total	100%	100%	100%	100%	100%	100%
n= (number of citations)	216	544	1,306	674	414	3,154

Note: The list contains more than 180 names. The last column allows more precise recovery of the number of citations over the era, but all other percentages are rounded off to the nearest whole number. The use of 0% indicates less than .5% of the citations for a given decade rather than no citations whatsoever.

The results of this study, of course, are completely consistent with the pattern of practices outlined above. The Founders quoted the Bible more than one-third of the time and four times as frequently as any other source. This is impressive testimony to the

126. *Supra* note 60 at p. 141. Originally published as "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," in *American Political Science Review*, LXXVIII (1984), at 189-97.

127. *Id.*

Bible's fundamental importance in the foundation of our government, our Constitution, and our liberties.

IX. CONCLUSION

Rejecting the original understanding of the First Amendment and substituting the religion-hostile *Lemon* test has produced inconsistent results in the lower courts, the dramatic restriction of religious freedom in America, prohibition of practices the Founders' allowed and sought to encourage, and contributed to the general decline in standards and morals among America's youth. None of this is necessary. Reversing the decision below and restoring the non-coercion test would better balance encouragement and freedom of religion.

Respectfully submitted,

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